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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Implementation of Sections of the )  
Cable Television Consumer Protection )  
and Competition Act of 1992 ) MM Docket No. 92-266  
Rate Regulation )

**REPLY COMMENTS OF JOINT PARTIES  
ON THE THIRD NOTICE OF PROPOSED RULEMAKING**

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ON THE THIRD NOTICE OF PROPOSED RULEMAKING**

The undersigned cable operators<sup>1</sup> submit these reply comments in response to the comments filed in this matter on September 30, 1993.

**1. THE COMMENTS ILLUSTRATE WHY THE COMMISSION SHOULD NOT DEFER TO LOCAL FRANCHISING AUTHORITIES ON ISSUES OF RATEMAKING POLICY.**

Comments by local franchising authorities in this matter illustrate both the substantive and procedural perils of trying to

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<sup>1</sup> The parties joining in these reply comments are: KBLCOM, Inc., Century Communications Corp., Jones Intercable, Inc., TeleCable Corp., Bresnan Communications Corp., Greater Media, Inc., Monmouth Cablevision Ass'n, Rifkin & Associates, Western Communications, Allens Television Cable Service, Inc., Brownwood Television Cable Service, Inc., CableSouth, Inc., Coosa Cable Company, Inc., Corsicana Cable TV, Inc., Halcyon Communications, Inc., Helicon Corp., James Cable Partners, Cablevision, Inc., Phoenix Leasing, Inc., Rock Associates, Satcom, Inc., Sjoberg's, Inc., Sweetwater Television Company, TCA Cable, Inc., United Video Cablevision, Inc., Zylstra Communications Corp., Cable Television Ass'n of Georgia, South Carolina Cable Television Ass'n, Tennessee Cable Television Ass'n, Texas Cable TV Ass'n, and OCB Cablevision, Inc.

establish a scheme under which the FCC would "defer" to local ratemaking decisions in any way.

On the substantive level, local franchising authorities' comments show that, at least for now, they are trapped in their traditional role of an adverse party negotiating with a cable operator. As a result, they have not yet come to appreciate that with their new regulatory power under the Cable Act comes a new responsibility to decide ratemaking issues in a manner that is fair and evenhanded to operators and subscribers alike.

For example, one group of local franchising authorities complains that it would constitute "punishment" of them to allow streamlined recovery of the costs of required upgrades, and expresses some skepticism as to whether upgrade costs should be subject to recovery at all.<sup>2</sup> It would clearly be inappropriate for the FCC to give deference to entities that view even cost-justified rate increases as "punishment."

On the procedural side, local franchising authorities propose a number of schemes under which they, or the FCC, may, or may not, defer to or rely on decisions by the other, with provisions for formal or informal consultation and sharing or relying on the same written record.<sup>3</sup> In practical terms, any of these proposals would

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<sup>2</sup> See, e.g., Comments on Third Further Notice of Proposed Rulemaking by Austin, Texas; Dayton, Ohio; Dubuque, Iowa; Gillette, Wyoming; King County, Washington; Montgomery County, Maryland; the City of St. Louis, Missouri; and Wadsworth, Ohio ("Miller & Holbrooke Comments") at 2-4.

<sup>3</sup> See, e.g., Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, (continued...)

be an administrative nightmare, with neither regulator ever sure whether it is making an independent determination of the facts, or one based on some kind of "deference."

The solution is for the Commission to step up to its responsibilities as the "senior" regulator involved in the cable industry and (a) set out clear rules for local franchising authorities to follow in cable rate proceedings, including, specifically, rules relating to the allocation of costs among different regulated tiers of service; and (b) promptly reverse any local decision that fails to follow those rules.<sup>4</sup>

**2. THE COMMENTS SUPPORT ALLOWING ADEQUATE RECOVERY OF UPGRADE COSTS ON A STREAMLINED BASIS.**

There is wide support in the Comments for some mechanism to allow cable operators to recover the costs of system upgrades on a streamlined basis, whether those costs are incurred in connection

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<sup>3</sup>(...continued)

and the National Association of Counties in Response to the Third Notice of Proposed Rulemaking ("NATOA Comments") at 12-14; Comments on Third Notice of Proposed Rulemaking [on behalf of Municipal Franchising Authorities] at 7-8; Comments of the Massachusetts Community Antenna Television Commission at 5-8.

<sup>4</sup> See Comments of Joint Parties on the Third Notice of Proposed Rulemaking ("Joint Parties' Comments") at 8-9. The adoption of cost allocation rules will eliminate any realistic concern that cable operators might "game" the regulatory system by choosing benchmark regulation for one tier and cost-of-service regulation on other tiers. See id. at 4-7.

with an upgrade required by franchising authorities,<sup>5</sup> or undertaken voluntarily by a cable operator.<sup>6</sup>

The record makes clear that the operation of the benchmark formula does not provide adequate revenues to cover the incremental costs of a major system upgrade. While some franchising authorities have submitted a report purporting to demonstrate the contrary,<sup>7</sup> all that report shows is that, in the particular upgrades examined, some economies of scale were observed. But that is a far cry from showing that the economies of scale (in the context of channel capacity) an individual operator might obtain through an upgrade are anywhere near as great as the economies of scale contained in the benchmark formula.<sup>8</sup>

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<sup>5</sup> **See, e.g.,** Comments in Response to the Third Notice of Proposed Rulemaking [on behalf of Falcon Cable TV, et al.] ("Falcon, et. al., Comments") at 18-23; Comments of Tele-Communications, Inc. ("TCI Comments") at 9-11; Comments of Time-Warner Entertainment Company, L.P. ("Time Warner Comments") at 11-12; Comments of Joint Parties [Cablevision Industries, et al.] ("Cablevision Industries, et al., Comments") at 16-18; Comments of Continental Cablevision, Inc. on the Third Notice of Proposed Rulemaking ("Continental Comments") at 17-19; Comments of the New York State Commission on Cable Television ("NYSCCT Comments") at 5.

<sup>6</sup> **See** Continental Comments at 14-17.

<sup>7</sup> Miller & Holbrooke Comments, Exhibit A (Jay Smith Report) at 2-4.

<sup>8</sup> Some franchising authorities would deny operators even the benefit of the benchmark formula's revenue increases when a channel was added as a result of an agreement with a broadcaster to retransmit the broadcaster's signal. Miller & Holbrooke Comments at 8-9. There is no basis for this conclusion, however. When subscribers receive an additional channel of programming, they can reasonably be expected to pay for it, irrespective of the precise business motivation that led the operator to add the channel in the first place.

Indeed, as a number of Commenters observed, under the benchmark formula, revenues per subscriber can remain essentially unchanged when channels are added, allowing no incremental revenue to cover the (often substantial) costs of the upgrade.<sup>9</sup> As a result, the Commission must allow some kind of streamlined "escape valve" from the benchmark formula, or else accept that the only operators who will actually upgrade their systems are those willing to undertake the time and expense of a full-blown cost-of-service showing.

In light of these facts, it is not surprising that the only parties opposing streamlined, "external" cost recovery for upgrades required by franchising authorities are the franchising authorities themselves.<sup>10</sup> Cable operators, however, are clearly entitled to recover their legitimate costs of providing regulated cable service, through a cost of service showing if through no other means. As a result, the only issue here is whether those costs can be recovered in a streamlined and efficient manner.

Continental Cablevision has proposed a simple formula for identifying the costs of upgrades and including those costs in regulated rates on a streamlined basis.<sup>11</sup> The Joint Parties

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<sup>9</sup> See, e.g., Continental Comments, Exhibit A; Falcon, et al., Comments at 6-7.

<sup>10</sup> See Miller & Holbrooke Comments, Section I.A. and Exhibit A; NATOA Comments at 6-7. To its credit, the New York State Commission on Cable Television acknowledges that "external" cost treatment of upgrades required by franchising authorities is the most consistent with the Commission's rules. See NYSCCT Comments at 5.

<sup>11</sup> Continental Comments, Sections III and IV.

support the use of Continental's formula in calculating the costs of upgrades required by local franchising authorities.

For voluntary upgrades that lead to the addition of channel capacity, the Joint Parties suggest that the preferred (and simpler) solution to the issue of additions of channel capacity is to allow the new channels to be added at the current "Line 600" rate for a reasonable transitional period.<sup>12</sup> To the extent, however, that the Commission does not accept the Joint Parties' "Line 600" proposal, the Joint Parties agree with the several Commenters who explained why any rate adjustments resulting from channel additions or deletions should be limited to the service tiers affected by the change.<sup>13</sup> Limiting rate changes in this way will eliminate the anomaly, apparently contemplated by the Commission's proposal, of basic tier rates increasing as a result of adding a channel to a cable programming service tier.

### Conclusion

Based on the record of this proceeding, the Commission should (a) allow streamlined recovery of the costs of system upgrades required by franchising authorities; (b) allow cable operators to add channels to regulated tiers of service at their current per-channel, per-subscriber rates; and (c) establish rules, binding on

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<sup>12</sup> See Joint Parties' Comments, Section 3.

<sup>13</sup> See, e.g., Falcon, et al., Comments at 9-11; TCI Comments at 2; Time-Warner Comments at 4-5; Continental Comments at 11-12; Cablevision Industries, et al., Comments at 8-9.

local franchising authorities, covering all major ratemaking issues, including cost allocation issues, and give no deference to decisions by those authorities.

Respectfully submitted,

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